

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 19 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

ISHWARLAL LILADHAR BHOI

Versus

THE STATE OF GUJARAT

Appearance:

MR RM CHHAYA FOR MR ND NANAVATI for Petitioner
MR KP RAVAL, APP, for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 18/04/98

ORAL JUDGEMENT(Per S.M.Soni, J.)

The appellant, accused in Sessions Case No.115/89 is held guilty for the offence punishable under section 302 of the Indian Penal Code and is sentenced to undergo life imprisonment by the judgment and order of the Additional Sessions Judge, Junagadh of 19th December

1990. The appellant ('accused' for short) was charged under section 302 of Indian Penal Code for committing murder of his wife Manguben by putting her on fire after sprinkling kerosene on her at about 11 O'clock night on 9th October, 1989.

Facts, in short, of the prosecution case are as under:

Deceased Manguben was married with the accused and have 5 children out of that wedlock. The eldest child, a daughter, appears to be of about 9 years on the date of incident. On the date of incident, two of her daughters had gone to play 'Garba' and one daughter had remained with her. Her one son and daughter were residing at Bombay with her father. Accused had left two of his daughters to play in 'Garbi' and had returned home by about 11 O'clock night. When accused returned home, deceased was sleeping. Accused then inquired as to why is she sleeping and she replied that as she is tired, she had slept. Accused then told her that "allright, you may go and sleep" and she slept. After some time, accused took a tin which contained kerosene and poured the kerosene on the deceased and ignited her. After igniting, the accused came out of the house and chained the house from outside and ran away. Neighbourers on hearing shouts rushed to spot and opened the door and fire was extinguished by covering her with quilt and other clothes. Neighbours though gathered, no one removed her to hospital. However, one social worker removed her to Junagadh Civil Hospital. Junagadh Civil Hospital then sent yadi to City Police Station and the Police Sub-Inspector, Junagadh on reaching the Junagadh Civil Hospital recorded her complaint. Thereafter, the Executive Magistrate was called, who also recorded her dying declaration. Offence was registered and investigation was started. On completion of the investigation, chargesheet was submitted against the accused in the Court of Chief Judicial Magistrate, Junagadh, who in his turn committed the case of the accused to the Court of Sessions, as the charges were exclusively triable by the Court of Sessions.

The learned Additional Sessions Judge framed charge against the accused. The accused pleaded not guilty and claimed to be tried. The prosecution led necessary evidence. The learned Judge after hearing the parties held the accused guilty of offence punishable under section 302 of the Indian Penal Code and passed the order of conviction and sentence as referred above. This judgment and order is under challenge in this appeal.

Learned advocate Mr R.M.Chhaya, appearing for the appellant, has challenged the conviction on the grounds, namely, that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt, that the learned Addl. Sessions Judge has erred in accepting the dying declaration Ex.16 as well Ex.26 and also Ex.35. Mr Chhaya has contended that all the witnesses of prosecution are either partisan or interested one and in absence of any independent corroboration, learned Judge has erred in accepting their evidence. Mr Chhaya further contended that the dying declaration Ex.16 is highly suspicious piece of document and should not have been relied upon by the learned Judge. The learned Judge has also erred in seeking corroboration from such piece of evidence like Ex.16 which is a weak piece of evidence to other evidence which, according to him, are also weak pieces of evidence. Mr Chhaya contended that the case is based on circumstantial evidence and the chain is not complete to lead to an inference of hypothesis of guilt of the accused. Mr Chhaya contended that the circumstances on record based on evidence on record lead to an inference that the deceased has committed suicide and the accused is not responsible for the same. He has, therefore, contended that the appeal should be allowed and the accused should be acquitted and set at liberty forthwith.

Mr K.P.Raval, learned APP, supports the judgment under appeal. Mr Raval contended that the incident took place at night hours in the house of the deceased and except neighbours and some relations, no other witnesses would be available and unfortunately the witnesses being relatives or acquainted as neighbours to the accused have not come forward to support the prosecution case. He contended that whoever witnesses were available are examined and they cannot be said to be either partisan or interested witnesses. Mr Raval contended that there are as many as three dying declarations in the instant case, namely, Ex.16, Ex.26 and Ex.35 and they are all supporting each other. Mr Raval further contended that the circumstances relied on by the learned Judge do make a complete chain and it leads to an inference of hypothesis of guilt of the accused. Mr Raval, therefore, contended that the appeal should be dismissed.

To appreciate the diverse contentions raised by the learned advocates, it will be relevant to refer to the evidence of one Ashwin Maniar, PW 5, who carried the victim to the hospital. PW 5 has stated that on the day of incident by about 11 O' clock at night, he was going

towards Vanjari chowk from Panchhatdi chowk. When he reached near Old Masjid area, he saw a mob of about 100 to 150 persons. He was informed that a woman is burnt and no one is prepared to help her. He, therefore, parked his motor-bike on the side and asked someone to call for a rickshaw. There, he found one woman lying on the threshold of the house with some part of body in the house and head lying on the side of the threshold. The injured was craving for water. She was covered with a carpet. She was then removed in a rickshaw and someone from the mob was requested to accompany her to the Civil Hospital. He then followed them on his motor-bike to Civil Hospital and he got her admitted in the hospital. Doctor on admission in the hospital, asked her name and she disclosed as Manguben. Doctor asked him to get the case papers issued and his name was referred as a person who brought the injured in the hospital. PW 5 is cross-examined and he has admitted in the cross-examination that because of burn injuries, the lady was shouting and because of pain she was replying slowly after understanding the questions put by the doctor. Thus from the evidence of PW 5, it is clear that the deceased was removed to the hospital by him and in his presence, Doctor did ask her something which she was replying after understanding the same.

After she being admitted in the hospital, she was examined by Dr.Makwana. Unfortunately, though Dr. Makwana had played a very important role to disclose the prosecution story, yet he was not examined before the Trial Court. The learned advocate Mr Chhaya contended that the doctor who first examined her at the time of admission in the hospital was not examined and therefore adverse inference must be drawn. Mr Chhaya contended that adverse inference should be drawn to the effect that she was not fully conscious and able to answer any of the questions rationally. Dr.Makwana has prepared the case papers at the time of her admission. Dr.Makwana is alleged to have certified the dying declaration to the effect that the patient is conscious during recording of dying declaration till completion of the same. Despite this fact, Dr.Makwana was not examined as a witness to prove the aspects about the consciousness of the patient and her ability to understand the questions that might be put despite the stress and pain. The learned APP then has filed an application being Criminal Misc. Application No.685/98 before this Court to allow them to lead additional evidence of Dr.Makwana. After hearing the parties, the said application was allowed and Dr.Makwana is examined by this Court. As Dr.Makwana was examined, further statement of the accused under section

313 of the Code of Criminal Procedure 1973 ('Code' for short) was also recorded. In the course of his further statement, the accused expressed desire to examine his daughter as defence witness and she is also examined before this Court. In the course of examination of Dr.Makwana as well as defence witness Hetalben, daughter of the accused, the accused was allowed to remain present before this Court and he has remained present before this Court.

At the first time on 16th March, 1998 when Dr.Makwana was examined before this Court, accused was not present before this Court. However, his advocate had cross-examined the doctor. On 23rd March, 1998, when further statement of the accused was recorded, to rectify the irregularity, if any, that the accused was not present when Dr.Makwana was examined, this Court recalled Dr.Makwana and he was further cross-examined by his advocate in presence of the accused. Dr.Makwana in his evidence has stated that on 9th October, 1989, by about 11.50 at night, Manguben Ishwarlal was admitted in the hospital for treatment. On examination, it was found that she had burn injuries on her body. On inquiry, the cause of burns as stated by her is that she is burnt by her husband. Accordingly, he has made an entry in the case papers. The injured was fully conscious at that time. She was given necessary treatment and he then informed the police that the dying declaration may be recorded. She was then removed to Burns Ward from Emergency Ward. Dr.Makwana has further stated that after an hour of his intimating the police, Mamlatdar/Executive Magistrate had come to the hospital with yadi and he was asked to accompany him as he told him that dying declaration of Manguben was to be recorded. Dr. Makwana had accompanied him to the Burns Ward. The Mamlatdar had asked Dr.Makwana whether the injured Manguben is conscious or not. On preliminary inquiry and interrogating the injured, he had replied that the patient is conscious and is in fit state of mind to reply. Except the patient, Mamlatdar and himself (doctor), there was none in the ward. All the relations of the patient were removed out of the ward till the dying declaration was completed. He was present till the completion of recording of dying declaration. The patient was conscious from the beginning till the end of recording of dying declaration. He has put an endorsement to the effect that the injured put her thumb mark in his presence. The witness has stated in the cross-examination that the time when the patient was brought to the hospital is not stated in Ex.35. He further stated that such patient is normally given

intravenous drip and antibiotics and Manguben was given intravenous drip by performing venesection on her leg. Manguben was given injection pentajodin, a pain killer. The witness has cleared that the same was given after dying declaration was recorded. The witness has stated that a note is made in Ex.35 accordingly. The witness has stated that all the instructions stated in Ex.35 which would be part of Ex.36 must have been carried out. Under the provisions of section 114 of the Evidence Act, all the official acts are presumed to have been regularly performed. If the defence wants to suggest that the said instructions in Ex.35 have not been followed, to rebut the presumption, the defence was required to place something on record on the basis of which it can be said that presumption is rebutted. In the instant case, from the cross-examination of this witness Dr. Makwana nothing transpires from which one can say that the presumption of official acts being regularly performed is rebutted. Thus when doctor says that pain-killer pentajodin was given after recording of dying declaration, it is required to be accepted in absence of any material on record. The doctor has assigned the reason why the said pain-killer injection was required to be taken after recording the dying declaration. Doctor has said that the same is given after recording of dying declaration because it has a sedative effect. The doctor has also denied any mental effect on victim by intravenous drip or antibiotic. Based on this evidence, when Doctor has stated before the Court and has also endorsed the dying declaration that the patient was conscious, we do not find any reason to disbelieve the same. The defence has not been able to place any material on record which may entitle us to disregard this say of the doctor that the patient was conscious when dying declaration was recorded.

Keeping the above evidence of Dr. Makwana in mind, we will now refer to Ex.35, the case papers. The said papers are of Manguben Ishwarbhai, aged about 25 years. In the column of diagnosis, it is stated that "patient gave h/o (history of) burns by her husband. On examination, patient is conscious. 1st and 2nd degree burns all over body on her. Pulse 90/125, blood pressure 100/80, temperature normal". In the margin of caption date, it is mentioned that "informed police and DD". Ex.36 are the case papers of ward where on the reverse of it some comments are made about pulse. In case paper Ex.35, it is specifically mentioned the prescription pentajodin (after dying declaration). The patient was brought immediately in the hospital by PW 5 and Dr. Makwana has examined her. As it is normally asked

about the history of injuries, Dr. Makwana has asked the history of injuries in the present case also and the patient has replied that she was burnt by her husband. It is very clear from the evidence of PW 5 that though a mob of about 100 to 150 persons gathered, no one from the mob was prepared to take her to hospital. One can assume that in the mob many of the residents of that very locality must have been there. Yet no one has shown any humanitarian approach and taken the injured to hospital. It is only PW 5 who was simply a passerby has taken her to hospital. We are referring this aspect for the reason that PW 5 is not known to the injured nor he knows the injured. But he has carried the injured to the hospital in the name of humanity. It is nowhere suggested in the cross-examination of PW 5 that PW 5 has any acquaintance in any form either with the injured or with her husband or any of the relations. Thus it is clear on reading of evidence of PW 5 and Dr. Makwana that on inquiry by doctor, the injured was able to understand the question and reply the same and accordingly on inquiry by Dr. Makwana, she has replied that she was burnt by her husband. We do not find any reason to disbelieve this part of evidence of Dr. Makwana. Simply because Dr. Makwana was not examined initially and is examined at the appellate stage, does not taint his evidence in any manner whatsoever more particularly when he is deposing on the basis of the case papers.

This will now bring us to another circumstance of a statement made before the Police which also amounts to a dying declaration. Dr. Makwana immediately on examination of the patient and preparing case papers and prescribing medicines has written a yadi to Police Inspector, Junagadh City Police Station. That yadi is at Ex.13-A. In that yadi also Doctor has stated that dying declaration is required to be taken. The injured was removed to the hospital after the incident which took place at 11 O'clock at night. No doubt, time of entry in the hospital in case paper Ex.35 is not stated. But time is stated when the patient was removed to burns ward and it appears to be at 11.50 p.m. on that very day. We can say that Dr. Makwana must have transferred the patient to burns ward and must have simultaneously written yadi to the Police Station. The police on receiving yadi has immediately reached to the hospital and has recorded her statement, Ex.26. Ordinarily this statement would not be admissible in evidence being a statement under section 162 of the Code as the yadi sent by the doctor would amount to an information disclosing cognizable offence. However, the same is admissible in evidence under the provisions of section 32 of the Evidence Act. PSI

Rangalsing, PW 10, on receipt of that yadi has immediately rushed to the hospital where it seems that he reached at 00.20 hours of 10th October, 1989. Looking to the time mentioned in the case paper of burns ward, it can be said that PW 10 reached earliest in the hospital. PW 10 has stated that he went to burns ward. He further stated that "in burns ward Manguben was there. She was in burnt condition. I talked with Manguben. She was fully conscious and she gave complaint in his presence which is Ex.7/1. The same was read over to her and her thumb mark was taken below it as she was not able to sign as both her hands were burnt". Recording of complaint was over by 12.40, meaning thereby, 00.40 hours and one Anil Premji, PW 6, has identified her thumb mark. It will be relevant to state that when PW 10 recorded the complaint, Dr. Makwana was not present there. But PW 10 has talked with her and after he found that she is fully conscious, he has recorded the complaint. Keeping this in mind, we will now refer to his cross-examination. He has stated that he did not know Manguben either personally or by name before the incident. However, he got introduction of Manguben from nurse on duty. He has denied that some of the relations were there near the cot of Manguben. When he reached the hospital, treatment of Manguben was going on. He has stated that he had realised that Manguben was suffering from pain. Looking to the injuries of Manguben he had not doubted that she may die. When he started recording complaint, he found that the condition of Manguben was serious. He has stated that he did not find it necessary to get certificate from the doctor that she will be able to answer the questions on understanding as she was fully conscious. An attempt was made by the defence to show that there is some manipulation about the timing of entry of the injured in the hospital recording of statement by the police and recording of dying declaration by the Executive Magistrate. This argument is founded on one over-writing in Ex.27. At the bottom of Ex.27, below date 10.10.89, 0.50 hour is written. Below the date and time, there is signature of PSO of Junagadh City. Ex.27 is a complaint and it is admitted in the register on 10th October 1989 at 0.50 hours. In this writing, 0 of 10 of the date and 0 of hour 0.50 are over-written. We have made an attempt to see what was the original writing and we found that the original writing was 9th October, 1989 and hours 1.00. Thus 9 is corrected to 10 by overwriting 9 to 0 and 1.00 is corrected to 0.50 by correcting 1 to 0. The injured was admitted in the Burns Ward at 11.50. Dr.Makwana has communicated to the Junagadh Police Station by yadi Ex.13-A. On receipt of yadi, PSI, Rangalsing, PW 10, has reached the hospital and has

recorded the complaint and sent it to the Police Station for registering the same. It is not known as to what is the distance between the Junagadh Civil Hospital and the Police Station. The complaint is registered at 0.50 hours in the Police Station. Assuming that the original writing of 1.00 hours is correct, then it can be said that the complaint was registered in the Police Station at 1.00 a.m. early morning, 10 minutes after as recorded by the Police. But this entering of complaint in the FIR in our opinion, be it 0.50 hours or be it 1.00 hours does not in any manner affect much less adversely to the case of the prosecution. Thus, his cross-examination, in our opinion is of no significance. It is clear from the evidence of PW 10 that when he reached the hospital, he had gone to the victim on being identified by the nurse on duty, recorded her statement, which was treated as a complaint and was sent to the Police Station for registering offence. Dr.Makwana has written a yadi to the Police Station, but has also simultaneously stated below the yadi that dying declaration is required to be taken and accordingly necessary communication was sent to the Executive Magistrate to record dying declaration.

We will now further test about the timing from the evidence of the Executive Magistrate. When Junagadh City Police Station received yadi from Dr.Makwana, it appears that they have simultaneously communicated to the Executive Magistrate to go to the Junagadh Civil Hospital to record the dying declaration of Manguben. The Executive Magistrate has immediately reached the Civil Hospital. The Executive Magistrate, PW 1, has stated that on receipt of the yadi, he immediately reached the Civil Hospital. From yadi he learnt that Manguben is admitted in burnt condition and her dying declaration is to be recorded. He carried with him the doctor on duty to Burns Ward. From there he directed the police personnel and relations of Manguben to go out of the ward. We may state at this juncture that when the Executive Magistrate reached the Hospital, the Police has already reached the hospital and Police was attending Manguben. The Executive Magistrate asked the police personnel and relations to go out. The doctor then examined Manguben and she was found conscious and he started recording her dying declaration at 0.45 hours. He first asked her name and he recorded the dying declaration in question and answer form. PW 1 in his cross-examination has denied to have seen that the Police was recording her statement when he reached the Burns Ward. According to the evidence of PW 1, both the palms, thumbs and fingers of Manguben were burnt. This witness has denied that she was semi-conscious when her statement

was recorded. He has denied that Manguben had pain and was sighing. Thus we do not find anything from the evidence of PW 1 to infer any irregularity in recording dying declaration of Manguben which would entitle the rejection of the same. Taking of Manguben and admitting her in the hospital by PW 5, her examination on admission in the hospital by Dr.Makwana, prescribing necessary treatment after inquiring about the injuries, intimating the Police Station about the incident simultaneously with a request to record dying declaration, Junagadh City Police responding immediately to the yadi of Dr.Makwana and PSI reaching the hospital and simultaneously informing the Executive Magistrate to record dying declaration and recording of complaint and then of dying declaration, in our opinion, are in a proper sequence which does not overlap either of the incident to damage the other. If the timings of registering complaint in the Police Station if appears to be overlapping, then also the initial writing which we are able to read does not affect adversely the fact of recording of police statement as well as dying declaration.

The question now is whether the complaint recorded by the police and the dying declaration recorded by the Executive Magistrate are coherent with each other or are contradicting each other and damaging each other. If they are contradicting or damaging each other, then the question may arise whether both are required to be rejected or either of them can be accepted. The second question is required to be examined only if they are not found to be coherent with each other. We will, therefore, now revert to the complaint and the dying declaration simultaneously.

Learned advocate Mr Chhaya has shown us the variance between the two. We will first refer to the variance shown and suggested by Mr Chhaya and then we will see whether the variance have any effect on the credibility and reliability of these two documents. Ex.26 is the statement recorded by PSI, PW 10 and Ex.16 is the dying declaration recorded by the Executive Magistrate, PW 1. In the complaint, it is stated that the door was locked while in dying declaration it is stated that the door was closed. In the complaint it is stated that the accused opened the door along with other persons and entered the room while in dying declaration it is stated that others opened the door and extinguished the fire. In the complaint it is stated that fire was extinguished by her husband by quilt while in dying declaration it is stated that the fire is extinguished by Narottambhai and others by putting quilt. In the

complaint it is not alleged that she was burnt at the instance or instigation of her elder brother-in-law and sister-in-law while in dying declaration it is so specifically stated. In the complaint she does not refer to the complaint of her grievance against her husband to neighbours named Rama etc. while in dying declaration it is so referred. In dying declaration, thumb mark of foot is taken while in complaint thumb mark of right hand is taken. Mental condition of the injured is not certified in the complaint while the same is certified in the dying declaration. Based on the above referred variance, it is alleged that either of the statements should not be accepted. In our opinion, this variance should not amount to contradictions or omissions. Dying declaration is based on the questions put by the Executive Magistrate. It is in question and answer form while the complaint is in the form of narration. However, it also must be on the basis of questions put by the Police Officer. Simply saying whether the door was locked and the door was closed, in our opinion, should not make much difference. One should bear in mind that dying declaration was recorded subsequent to the recording of the complaint and there appears to be passage of about 20 to 30 minutes in between the two. If we refer the degree of burns from the evidence of Dr.Jyotindrakumar, PW 11, who had performed autopsy, it is clear that she had 1st and 2nd degree burns over face, neck, chest, breast, back, abdominal wall, lower limbs and upper limbs sparing palms and soles. Thus practically she had burns all over body and her condition from minute to minute must be growing more painful. One has to bear in mind the physical condition of the patient and particularly when she has to reply repeatedly to the questions put by the Doctor and then by the Police Officer and then by the Executive Magistrate. Such patient if asked repeatedly would like to shorten things wherever she feels because of frustration at the relevant time. Therefore, the alleged omissions or contradictions, in our opinion are neither contradictions nor omissions nor are damaging each other. Apart from both these Ex.26, complaint, and Ex.16, dying declaration, the first dying declaration, in our opinion is Ex.35 where Dr. Makwana asked her about the history of injuries when she was immediately admitted in the hospital and no one had accompanied her. She was alone where she stated that she was burnt by her husband. Therefore, in our opinion, both the dying declaration and the complaint are the pieces of documents which can be relied and acted upon.

An attempt is made to show that these documents may have been as a result of tampering of evidence of the

injured by Anilbhai Premji, an attesting witness who happens to be the husband of uncle's daughter of the victim. According to this witness, PW 6, he has stated that when he was viewing garbi, Ishwarbhai had come to call his daughter from garbi. Ishwarbhai also met him and told him that his wife is burnt and he had gone to the hospital to see her. This witness first say that he has gone alone to the hospital and then again went back after calling uncle of Manguben. According to him, Manguben was telling him that her husband had burned her. This witness is cross examined on the point as to when he reached the hospital and whether the police has recorded the statement and whether her dying declaration was recorded or not. This witness has stated that he had immediately gone to the hospital on receipt of information from Ishwarbhai at garbi that his wife is burnt. After reaching the hospital, he has gone back and again came back to the hospital with his uncle. When police was recording statement, normally, they will not permit anyone to enter the room or stand near about. There is a positive evidence of the Executive Magistrate that when he was recording dying declaration, he has driven out all from near the patient except the doctor. So whatever is stated by this witness about the recording of statement, signing of statement, time taken for recording of statement are only on assumptions. No doubt, this witness has attested the thumb mark of the deceased. This suggests that he was present in the hospital after the dying declaration was taken. This witness is not able to assist the prosecution as to who has committed the crime. The story advanced by this witness that the victim had told that she is burnt by her husband also, in our opinion, cannot be accepted as at that time police has come and her statement was recorded.

Learned advocate Mr Chhaya has contended that the deceased was a woman of easy virtue and therefore she has wrongly involved her husband though she has committed suicide of her own having fed up with the social sanction. To substantiate this defence has got produced certain documents through the prosecution witness No.4 Pragjibhai. Because of family dispute between the deceased and the accused, their community Panch had gathered and they have resolved that "Ishwarbhai Liladhar will stay with his mother and Manguben will stay alone in her old house till their parents come and resolve the dispute". Thereafter it appears that the parents had come and it was resolved that Manguben will not permit any unknown person in her house and if someone forcibly enters then the Panch be informed accordingly and the accused shall not continue the habit of taking

intoxicating substances and he also shall not bring any unknown person in the house. In any case, from this document, it appears that the husband and wife i.e. the accused and the deceased were not pulling on well. It appears from the resolution of the Panch that both were doubting the fidelity of each other. One of the resolutions of the Panch of the community of 2nd July 1988 is to the effect that the accused shall have to pay amount to Manguben to run the house, he shall not consume any intoxicating substance nor he shall assault his wife, nor he shall bring any unknown person in the house. From one of the resolutions, it is clear that the victim was prepared to stay separately in a house with her daughters and was not ready to join her husband. If a woman is prepared to stay separately from her husband, normally, she can be presumed to be of bold temperament. Such a woman may not commit suicide. It is clear from the dispute as placed before the Panch of the community that fidelity of each is suspected and an attempt is made by the accused to get divorce on the ground of suspected fidelity. Be this a ground for commission of offence or not, but the fact remains that the accused has not taken his wife to the hospital. We will refer to the evidence of the defence from which it is clear that when the accused learnt that his wife is burnt and removed to the hospital, accused had gone to garbi to fetch his daughter and then he had gone to the hospital. Would a husband wait to call the daughter to go to hospital when he learnt that his wife is burnt? Another question is how the accused came to know that his wife is burnt. According to the defence witness, after the garbi was over when they went home and when they saw a mob on inquiry they learnt that his wife is removed to the hospital. This very fact as to how he learnt about the burn injuries of his wife also leads us to infer that what he has stated does not appear to be correct.

The accused has examined his own elder daughter as a defence witness. His eldest daughter who was of about 9 years old has come before this court to depose as a defence witness after practically 10 years of incident. She has deposed that "in garbi my grant-mother Prabhaben came and told me that my mother is burnt. This information was given at about 11.30". She, therefore, in company of her father went to the hospital where treatment of her mother was going on when she reached. When she reached the hospital her mother was in Burns ward and her mother was not able to speak. Her mother has not talked with her. Her mother took the name of her brother for about five minutes. In the cross-examination she has denied to have gone to the hospital at 1 '0

clock. She has denied that her mother was not speaking anything when she reached the hospital. Place of garbi is at a distance of 10 to 15 minutes from her house. From the tenor of the examination in chief of the defence witness, the defence wants to suggest that when the incident took place, the accused was not at home and was attending garbi where this witness was present. This witness was playing garbi and accused who has gone there to leave her in garbi was sitting and watching garbi there. When a person is playing in garbi then one of the viewers if sitting or going home or somewhere else and coming back cannot be definitely stated. Therefore the possibility of the accused having gone home alone when the witness was playing garbi cannot be ruled out. In a plea of alibi, the defence is required to establish positively in no uncertain terms that it was practically impossible for a person to go to a place and commit offence from the place where he was alleged to be by the defence witness. This fact is not established by the defence. Therefore, the defence led by the accused does not help him to damage or destroy the prosecution case.

Thus the evidence of Dr. Makwana, PSI Rangalsinh, PW 10, and the Executive Magistrate, PW 1, and the dying declaration, in unequivocal terms reveal that it is the husband of the victim who put her on fire as a result of which she has died. Following circumstances, in our opinion, make a complete chain of circumstances leading to the hypothesis of the guilt of the accused. the accused is residing in a house of 13 1/2 x 7 1/2. The injured was found lying on the threshold of the door. The accused in company of two daughters had gone to garbi and the victim has remained alone in the house. After she shouted about burning the door which was chained or locked from outside was opened by the accused or by someone and she fell on the threshold. About 100 to 150 persons gathered there, but in our opinion none was human being as none of them have taken her to the hospital. It is PW 5 who took her to the hospital. In the hospital Dr. Makwana treated her and the name of the victim was disclosed while he was inquiring about the history of injury. On information received from Doctor, PSI Rangalsinh, PW 10 reaches the hospital and complaint is recorded. On intimation from the Junagadh Police Station, PW 1 reaches the hospital and dying declaration is recorded in the presence of Dr. Makwana. Even if we ignore the dying declaration in the form of complaint recorded by PW 10, then also dying declaration recorded by PW 1, Muljibhai gets corroboration from the hospital case papers Ex.35. May be that PW 1 was over-conscious and has taken foot thumb impression. But things vary

from person to person and thumb impression is taken by PW 1 in the presence of Dr.Makwana. We therefore say that we may ignore for the moment the statement recorded by the police which is at Ex.26. However, from Ex.35 and Ex.16 it is clearly established that it is the accused who has put the victim on fire as a result of which she has died. The role played by the accused in the hospital is not known. It is not shown or suggested to anyone as to when the accused came in the hospital and what role is played by him. The accused had been pleading ignorance about the injuries till she was removed to the hospital. In the neighbourhood of the victim, only relations of the accused are residing. Victim had a grievance against the relations of the accused. The accused suspects the fidelity of the victim. Brother of the accused has filed a chapter case against the victim. This filing of the chapter case is suggestive of the adverse relations between the victim and her in-laws. Accused has filed a criminal complaint under section 497 and 498 against the victim and her alleged paramour. The incident has taken place on 9th October, 1989 and the said complaint was filed on 2nd August, 1989. From the proceedings before the community Panch, it appears that the victim was staying separately to avoid harassment of her husband. Taking advantage of that separate stay, case is made out against the victim for adultery with some one i.e. accused No.1 in the private complaint. Despite these allegations of living in adultery with one Hemant, the community persons appeared not to have accepted the same and directed them to live together imposing certain conditions on both of them. This might have frustrated the accused. The victim was alone in the house on the fateful night. Immediately on her being burnt, she was removed by some unknown person to the hospital. In the hospital, she has named her husband as one who has burnt her. She has also so stated before the Executive Magistrate. These facts, in our opinion, are duly proved. Ex.35 and Ex.16, in our opinion are two convincing documents which can be safely relied upon and has rightly relied upon by the learned Addl. Sessions Judge.

In view of the above, we do not find any reason to interfere with the judgment and order passed by the learned Addl. Sessions Judge.

In the result, the appeal fails and is dismissed.

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